IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 341.

THE UNITED STATES, COMPLAINANT,

vs.

THE JOINT TRAFFIC ASSOCIATION ET AL.

Points submitted by Mr. George F. Edmunds, of Counsel for the Pennsylvania Railroad Company.

STATEMENT.

The bill was filed January 9, 1896 (Rec., p. 45), alleging:

1. That the defendants were common carriers, engaged in interstate commerce. (F. 12.)

2. That on November 19, 1895, the defendants "unlawfully intending to restrain trade and commerce among the several States, and attempting to monopolize such trade and commerce, and intending to restrain

and prevent competition among the said railroads in respect to all the interstate trade and commerce hereinafter more particularly described, and contriving and intending unlawfully and unjustly to deprive the public engaged in such interstate trade and transportation of the facilities and advantages which the said public had theretofore enjoyed from the independent competition of said railroads, or any of them, in respect to the traffic hereinafter more particularly described, and intending to establish and maintain rates of freight and passenger transportation fixed arbitrarily, and uninfluenced by competition in respect to such traffic between the States and Territories of the United States, and between such States and Territories and foreign countries, entered into a certain unlawful contract, agreement, combination and conspiracy to restrain trade and commerce among the several States, in the form of a written document entitled, 'Articles of Organization with the Joint Traffic Association.'"

3. The contract is set out as a part of the bill. (Rec., p. 43 *et seq.*)

4. The bill alleged that the defendants were about to put the contract into execution, and prayed a decree declaring the contract null and void and enjoining the defendants from acting thereunder.

5. On March 9, 1896, the bill was amended by adding an allegation that the Interstate Commerce Commis-

sion on the 26th day of December, 1895, had notified the Attorney General that they considered the contract to be in conflict with the act to regulate commerce; and that thereupon the Attorney General directed the District Attorney to institute proceedings, etc. (Rec., pp. 48, 49.)

The answer of the Pennsylvania Railroad Company and its lines was filed March 23, 1896, and appears in the Record, pp. 169–184. It stated:

1. That the defendants were interstate carriers, existing under *State laws* and doing business among the States. (Pp. 169, 170.)

2. That the contract as set out *in hæc verba* in the bill was made in the form alleged.

3. That some of the defendants were competitors with others. (Pp. 170, 171, F. 510.)

4. That since the date of the making of the agreement, "continuously until the present time, such of said defendants as were previously engaged in competition have continued to be engaged in similar active competition, and to furnish to all persons engaged in such traffic and travel separate, independent, and competitive lines of transportation in respect thereto.

"They further aver that all of the said defendants parties to the said agreement intend to continue in like manner to be engaged in such competition and furnish-

ing of separate, independent, and competitive lines of transportation in respect to the traffic described in said bill.

"They further aver that all the companies parties to said agreement intend to conduct their business of transportation in accordance with the provisions of the Interstate Commerce Act, or any other law applicable to the premises, and in accordance with the provisions of their charters respectively, and to co-operate with the Interstate Commerce Commission to promote the observance of all lawful conditions."

5. That "said agreement was entered into by the parties thereto for the purposes therein recited, and for none other; that said agreement embodies truthfully, fully, and completely all the undertakings and agreements concerning the matters alleged in the bill into which said railway companies entered; that no other agreement in connection with the subject-matter was entered into by or between said companies; and that no purposes or intentions were entertained or sought to be furthered by said agreement or deducible therefrom, saving those in it recited." (F. 514.)

6. That they "deny all the averments in the bill of unlawful intent and of an intent to restrain trade and commerce among the several States and to monopolize the same." (F. 514.)

7. They deny specifically—

1. That said agreement was intended to restrain and prevent competition among the railroads in respect to interstate trade and commerce. (F. 515.)

2. That the railroad companies parties to said agreement intended to deprive the public engaged in interstate trade and transportation of the facilities and advantages which the public had theretofore enjoyed from their independent competition. (F. 515.)

3. That said companies intended to establish or maintain rates of freight and passenger transportation fixed arbitrarily, uninfluenced by competition. (F. 515.)

4. That said railroad companies entered into a combination or conspiracy to restrain trade and commerce among the several States. (F. 515.)

5. That said agreement was entered into in order to terminate competition amongst the parties thereto for freight and passenger traffic, or that it did terminate the same. (F. 516.)

6. That the parties to said agreement unlawfully, or in any way otherwise, pooled or combined any portion of their transportation or interstate commerce. (F. 516.)

7. That the parties to said agreement undertook to combine their freight or to divide their earnings or any portion thereof. (F. 516.)

8. They deny the allegations of the bill as to the nature of the agreement. (F. 517.)

9. They aver "that said agreement was not intended to, and did not, deprive the public engaged in interstate trade and transportation of any facilities and advantages which had been theretofore enjoyed by it from the independent competition of said railroads. They deny that said agreement was intended to or did establish or maintain rates of freight and passenger transportation fixed arbitrarily and uninfluenced by competition. They aver that on the contrary the rates of freight and passenger transportation by said agreement adopted were those which had been theretofore fixed by the various railroad companies and posted and filed with the Interstate Commerce Commission, and were reasonable and just, and so accepted. They deny that said agreement conferred upon the Board of Managers the powers in said bill averred, or any powers other than those stated therein. These defendants deny that said agreement made any surrender of competitive traffic to said Association, saving to the extent and in the way and manner therein set forth." (F. 518, 519.)

10. They admit that the agreement has been put in operation. (F. 520.)

11. They deny, "however, that they entertained or entertain any unlawful purpose, or that anything by

them intended to be done, or which will be done under and by virtue of said agreement, will operate to the detriment or disadvantage of the public, or will be in violation of the law of the United States." (F. 520.)

12. They deny intent to restrain reasonable and proper competition, and "aver that all such competition will be continued; that separate, independent and competitive lines of transportation will be maintained and operated as heretofore; and that said agreement will not in any wise interfere therewith." (F. 521.)

13. They aver that abolishing soliciting agencies, etc., will save $4,000,000 annually, and will produce "an advantageous result both to the companies and the shippers" (F. 522); and that it was an aid to the act to regulate commerce, and that its purpose was to prevent frauds on the act by "secret practices," etc., which produce "unjust discriminations between shippers" and "detriment to the public." (F. 523.)

14. They aver "that stable rates being reasonable and proper, are of benefit to the public, and that the cutting of rates below the standard of reason and justice is hurtful to shippers and the public." (F. 524.)

15. They aver "that by virtue of the agreement complained of the various parties thereto provided for the adoption in the first instance of rates which had been fixed upon because they were reasonable, and which have

been duly filed with the Interstate Commerce Commission." (F. 525.)

16. They aver "that the power conferred upon the Board of Managers to determine the division of rates and fares between the several railroad companies was not a power conferred on said Board to fix or determine rates for through traffic over competing lines; but only to fix and determine the pro-rata share or division of such established through rates or fares earned by the several railroad companies owning or operating the connecting railroads which constituted the respective through lines." (F. 530.)

17. They aver "that the object of the parties who entered into said agreement was to bring about a co-operation which would lead to the maintenance of reasonable and just rates, fares, rules and regulations of interstate traffic; would prevent unjust discrimination; would secure the reduction and concentration of agencies and the introduction of economies in the conduct of interstate commerce; would secure a stability and uniformity of rates which, as they are advised, was one of the leading purposes of the Interstate Commerce Act; and would insure a full, fair and honest carrying out of the purposes in said agreement set forth." (F. 531.)

The cause came to hearing on bill and answers. (F. 655, p. 219.)

The answer was in all respects strictly responsive; and even if it were not so, all its averments of fact must be taken as the true statement of the case.

POINTS.

I. The act of Congress in question is, in all its public aspects, a highly penal one in all its parts. It is true that section seven gives jurisdiction to the United States courts to entertain a proper suit in cases of personal injury; but the *right* to redress existed before.

The words of the act material to the present case are all contained in section one, which reads as follows:

"SECTION 1. Every contract, combination (in form of trust or otherwise), or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

II. The language of the section, in its just grammatical sense, covers only agreements that were void at common law.

The language is, "*every contract*," etc. Here there is no room for exclusion, exception, or limitation, unless it should appear (as in the case of the clergyman-laborer) that Congress could not have intended to violate common justice and common sense by applying the description to some particular case. The all-inclusive language describing the *actors* is then immediately changed in describing the *thing* that is declared illegal, and says, "in restraint of trade," etc. It does *not* say *any* restraint, as it should and would have done had Congress intended to describe the restraint in the same all-embracing words and sense employed in the specific and distributive antecedent; but, in simply saying "restraint of trade," it used an *integral phrase* descriptive of a *whole* as distinguished from a *partial*. Every kind of contract by every sort of person is one thing, while the description and definition of the thing forbidden to contract about is quite another. There was evidently an *industrious* use of the adjective "every" in describing the *contract*, and at the same time and in the same sentence an equally industrious omission to say, *any* restraint.

The philosophical and just reason for such a change of language in the same sentence is obvious. The first member of the sentence provided for the equality of *all* persons in making such contracts; — every one must fall under the same condemnation. The "syndicates of great capitalists" and the "unions" of "workingmen,"

and all the other endless combinations and sub-combinations of men, were put under the same sway of equal law. And is it too much to suppose that Congress and its committees understood the distinction, known at the common law and stated in the books, between "*general* restraint of trade" and "*partial* restraint," and that the general words, "restraint of trade," were used without the adjective "any" in the sense of the phrase being descriptive of what the common law condemned? Although a *whole* mathematically includes all its parts, when we speak of a whole descriptively of a subject that is to be supported and not restrained, we do not imply that no one of its parts must not be restrained from exercising a function that it can consistently with the operation of the whole. So if a particular contract does operate as a *partial* restraint of trade and is *moral* and useful, or not injurious to the general promotion of trade, it can not be justly held to be in restraint of trade. These two phrases, "general restraint of trade" and "partial restraint of trade," have been known and used distinctively and separately in the law for centuries. The following are some of the many authorities on the subject, and they are cited, where the quotations occur, in their own language.

Chitty on Contracts, Twelfth London Edition (1890), page 671, chapter XXI—"Of illegal, void and voidable contracts." This head of consideration includes every species of contract which the law will not enforce as

being against either a statute, morals, or public policy—restraint of marriage, interference with the course of justice, etc. In this category is arranged the subject in hand, "Impolicy: Restraint of Trade." He says, in the first paragraph: "On this principle any agreement by bond or otherwise in general restraint of trade is illegal and void." In the very next paragraph he says: "But an agreement which operates merely in partial restraint of trade is good, provided it be not unreasonable," etc.

I Pere Williams Rep., page 185. The court says: "All the books, when carefully examined, seem to concur in the distinction of restraint general and restraint particular," etc.

Story on Contracts (sections 674 and 675). The heading of the particular subject in hand precedes section 679, and is, "Contracts in Restraint of Trade." He opens section 679 as follows: "An agreement in *general* or *total* restraint of trade is void, although it be founded on a legal and valuable consideration." In section 680 he says: "But an agreement in partial restraint of trade," etc., "is valid."

It is certain that the distinct and qualifying descriptive word "any," correlative with the word "every" before "contract" in the first member of the sentence, was not placed as a prefix to the word "restraint" in the second member of the sentence. Why not? Is the word "restraint" more exact than the word "contract?"

The reverse is true. The purpose, therefore, was to leave the definition of the word "restraint" to the general principles and course of the common law.

But it may be asked why, then, did not Congress say so in the statute? The answer is, that if the words "restraint of trade as defined at common law" had been set forth, the doubt would at once have been raised whether this meant the common law of England at the time of the Revolution or now, or the common law of the several States, each of which may have its own, and which, as expounded, sometimes differs. To have introduced such a phrase would have created confusion and doubt instead of relieving it.

III. Every statute, whether penal or other, should be construed, if its language will possibly warrant it, in view of the mischief existing and the means of its cure, and either enlarged beyond its mere literalness or limited so as to remedy the existing wrong, and not interpreted so as to condemn what was before lawful and right. This proposition needs no authority or exposition, but I venture to refer to the following authorities, cited, where quotations occur, in their own language:

Endlich on the Interpretation of Statutes, chapter XI, section 295. "Where the language of a statute in its ordinary meaning and grammatical construction leads to a manifest contradiction of the apparent purpose of the enactment or to some inconvenience or absurdity,

hardship or injustice presumably not intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence." And in that section and in section 296 he gives many instances where this principle was applied.

Sutherland on Statutory Construction, section 246. "The mere literal construction of a section in a statute ought not to prevail if it is opposed to the intention of the legislature apparent by the statute; and if the words are sufficiently flexible to admit of some other construction, it is to be adopted to effectuate that intention. General words or clauses may be restricted to effectuate the intention or to harmonize them with other expressed provisions. Where general language, construed in a broad sense, would lead to absurdity, it may be restrained. The particular inquiry is not what is the abstract force of the words, nor what they may comprehend, but in what sense they were intended to be used as they are found in the act."

Maxwell on the Interpretation of Statutes, Third London Edition (1896), page 26. "But it is another elementary rule, that a thing which is within the letter of the statute is not within the statute unless it be also within the real intention of the legislature, and the words, if sufficiently flexible, must be construed in the sense which, if less correct grammatically, is more in harmony with that intention. Language is rarely so free from ambiguity as to be incapable of being used in more than

one sense; and to adhere rigidly to its literal and primary meaning in all cases would be to miss its real meaning in many." Again, in chapter II, page 74, he gives the heading—"Words understood according to the subject-matter." "The words of a statute are to be understood in the sense in which they best harmonize with the subject of the enactment and the object which the legislature has in view. Their meaning is found not so much in a strictly grammatical or etymological propriety of language, or even in its popular use, as in the subject or in the occasion on which they are used and the object to be obtained."

IV. What, then, were the existing or anticipated evils needing prevention, or condemnation, or punishment?

There were, it was seen or supposed, many combinations of so-called capitalists engaged in trade operating, as it was thought, injuriously to the safety and welfare of the United States. There were many combinations of so-called tradesmen and manufacturers, organized usually more firmly than combinations of capital had ever been or can be. There were numberless "unions" and "brotherhoods," etc., of handicraftsmen of every description, as well as similar organizations of "workingmen," all of which, in one way or another, affected commerce among the several States. The operations of most of them, carried on peacefully, doubtless aided and promoted the interstate commerce of the country—although probably

every one of them had in its laws and administrative provisions and conduct elements of a partial restraint upon the liberty of its members in respect of doing things within the range of interstate commerce that he might have freely and lawfully done if not a member. In such a state of things, was it either necessary or sensible to forbid the liberty of right conduct in order to prevent and punish wrong conduct? No nation and no State of the Union had thought it good for the welfare of its people to interfere with liberty of conduct further than was necessary to morality and the plain welfare of its people. The exercise of that personal liberty in the way of contract and trade that did not injure another or the State was hardly ever restricted, and when sometimes it was done, it was found that such restrictions were injurious to, rather than promotive of, the public welfare.

V. Congress is not empowered by the Constitution to determine finally what is for the public welfare. The end must be constitutional and the means constitutional and appropriate, as this court has often said. There can not be imputed to Congress, therefore, any intention to go beyond the long recognized boundary between contracts in general restraint of trade and contracts in partial restraint of it. The first clause falls within the category of those that are hurtful to the general good of society. This category is not condemned because of its

intrinsic immorality, etc., but because of its injurious effect on the rest of the community.

Where did Congress get the power to forbid the doing of acts by citizens that were moral and just, and which did not interfere with the general welfare? Congress had the power to regulate commerce; but it had no power to declare that commerce among the several States should not go on *at all*. It could so declare in respect of foreign nations, but in the exercise of an entirely different power from that to regulate commerce. It had no power to declare that no corn should come out of Nebraska or go into New York, or tobacco out of Virginia, or lumber or iron out of Michigan. Under the power to regulate commerce, it can lay no embargo either on persons or property between the States, where the character and condition of each is such as not to endanger the public.

VI. The language of the act should not be so interpreted as to overstep these limitations of power. I have shown that the specific and unambiguous words, "every contract," etc., include every species and variety of contract, etc., by whomsoever made. And I repeat, that a great number of executory contracts respecting trade among the several States do necessarily operate in partial restraint of trade, in that they prevent one party or the other from doing what he otherwise might have rightfully done in carrying on such interstate com-

merce. A contract to sell and ship all the waters of the Poland Spring in Maine to a purchaser in New York for one year, restrains the seller from trading in that water with a citizen of any other State. The same is true of every other innocent product of human industry. Innumerable instances and illustrations of this at once occur to the mind, and need not be stated.

Has Congress the power to prohibit such contracts?

The "restraint" mentioned in the act must, therefore, be held to mean that restraint which was, by the settled principles and judicial administration of law, vicious and injurious to society.

VII. It may be urged that these defendants, being corporations, can be dealt with by courts and the judiciary differently from other citizens.

This is denied, because:

(*a*) They are *State* corporations, having no other relations with the United States than the other citizens of their respective States engaged in interstate commerce.

(*b*) The act of Congress upon which this suit was brought makes no mention of or reference to corporations. They are embraced in the mass of citizens capable of making contracts.

(*c*) The Interstate Commerce Act makes no distinction between corporations and other citizens.

(*d*) Neither act could have done so without violating those principles of equality which are imbedded in the idea of justice and in the Constitution.

(*e*) A sovereign power may create corporations subject entirely to its will, but the sovereign power of the United States has not created any of these defendants, and therefore they could not be, and were not, dealt with in their character as such.

VIII. It has been suggested that Congress may have intended to forbid contracts that in any way partially restrain the liberty of the parties to trade, even if the contract were moral, reasonable, and beneficial to the public (as, for instance, a contract among bakers not to raise the price of bread), because of the difficulty of determining what was moral or reasonable or beneficial to the public, or the reverse. But all the history and experience of civilized States, from the beginning, involved the same difficulty, and, daily, over the civilized world courts of justice have been and are deciding this very class of questions. Within the range of subjects now under consideration, the judiciary is the only safe and constitutional depositary of such a power. A large share of the legislative efforts to decide such questions has proved to be disastrous.

IX. The agreement in question was, tested by the principles of the common law, valid.

(*a*) The record shows that it was *in fact* executed with pure motives and for honest and just business purposes, and in the belief that its operations would conduce to the public welfare; and in so far as it had been executed at the time of the filing of the answer, it appears that its practical execution, according to its terms, had been conducive to the public interest.

(*b*) It is perfectly true that a contract which does, on a just interpretation of it, provide for invading public policy, is void, even if made with innocent and patriotic purpose.

(*c*) But if the contract be of a character, on its face, which is so flexible or vague that it may be construed one way or the other, then the intent and purpose of the parties and their method of its execution are necessary elements of its character.

(*d*) If in such a case it is being executed in promotion of the public interest, it is good, because its construction and meaning have been found fairly consistent with the actual interpretation the parties have put upon it in its execution. But if the very same contract should be carried into execution by the parties in a manner injurious to the public interest, the judiciary should and would construe it to be vicious.

(*e*) Courts have no just right to make a contract criminal by construction when the conduct of the parties in executing it is promotive of public interest, if the contract itself can be fairly, or even possibly, construed as not criminal.

X. The agreement was not in *any* restraint of trade. On the contrary, it was an agreement of *constraint* on the parties to it to obey and execute the statute law relating to interstate commerce, and to promote that public policy which requires commercial equality and fair play.

It is assumed that these carriers are citizens, although associated as corporations, and not outlaws; and that they are entitled to the same liberty of trade and contract *pro re nata*, that the farmer, the merchant, and the workingman have.

(*a*) As between the parties to it, the preamble of the agreement is its key-note, and stands as a constitutional declaration of rights and duties. It gives the character and spirit in which its specific terms are to be read. It declares that the agreement is formed: "to aid in fulfilling the purposes of the Interstate Commerce Act; to co-operate with each other and adjacent transportation associations, to establish and maintain reasonable and just rates, fares, rules and regulations on State and interstate traffic; to prevent unjust discrimination, and to

secure the reduction and concentration of agencies, and the introduction of economies in the conduct of the freight and passenger service." (F. 50.) It is declared that the parties "make this agreement for the purpose of carrying out the objects above named." (F. 54, 55.)

If a controversy should arise between the parties as to a particular rate or other thing required of one of them, that party could defend himself in a judicial court by showing that the rate required of him was *not* "reasonable and just." He could stand on the solid ground that the agreement did not authorize any Board to fix an unreasonable or unjust rate. It is uniformly settled law that what is not reasonable and just in such cases is a judicial question, which, however difficult at times, the courts must determine.

(*b*) It follows that the specific provisions of the agreement must be read in the light of the preamble, unless a particular provision should be found clearly contradictory of it.

There is no such contradiction, or any inconsistency, between any of the provisions—all administrative—of the body of the agreement with the preamble.

(*c*) Carriers may lawfully and justly agree to combine to aid and promote trade and commerce. Such co-opera-

tive combinations (as the New York Clearing House, for instance) are many, and they promote and encourage the best interests of trade and commerce, and have even saved great business communities from financial disaster.

XI. Assuming the foregoing propositions to be true, it is confidently asserted that—

(*a.*) Article one of the agreement (F. 56) is not obnoxious either to law or morals. It is merely an adjustment of methods of management.

(*b.*) Article two: "The Association shall have jurisdiction over all competitive traffic." (F. 57.)

What kind of jurisdiction?

The agreement itself furnishes a definite answer: "For the purposes of carrying out the objects above named." (F. 54, 55.)

Those objects were—

1. To help enforce the Interstate Commerce Act.

2. To co-operate with each other to "establish and maintain reasonable and just rates."

3. "To prevent unjust discrimination."

4. To "secure the reduction and concentration of agencies."

5. The "introduction of economies." (F. 49, 50.)

This is the *jurisdiction* of the association and all of its members, and the whole of it.

Aiding to enforce the Interstate Commerce Act is not restraint of trade.

Co-operation to "establish and maintain reasonable and just rates" is co-operation to accomplish what the very words of the Interstate Commerce Act command carriers to do. Can any word in an act of Congress—short of literally saying so—be construed to make it a crime to agree to try to *obey* another act of Congress?

To "prevent unjust discrimination" is not any restraint of trade; but, on the contrary, is to purify and promote it.

To "secure the reduction and concentration of agencies" is not restraint of trade. No carrier is bound by law or morals to have any agencies at all; therefore, an agreement to abolish all of them is perfectly right and lawful.

If, for instance, the Post Office Department should withdraw all its agencies for the sale of stamps, it could not be said to have restrained the liberty of buying stamps.

The "introduction of economies" may be taken without comment.

These are the whole "head and front of our offending" if the specific detail of the agreement is not clearly inconsistent with the fundamental statement so set out in it.

This detail will now be considered article by article.

Article 1. (F. 56.) This is merely and solely organization, and needs no explanation or defense.

Article 2. (F. 57.) "SEC. 1. The association shall have jurisdiction over all competitive traffic." This is the jurisdiction, and only the jurisdiction, that the fundamental statement warrants. Like the jurisdiction of this court, and all courts, it is that which its constitution allows. It is not a grant of any arbitrary power.

Article 3. (F. 60–65.) This article provides that the presidents of the parties shall constitute the "Board of Control."

It provides, (1) for organization; (2) that it may fix salaries; (3) that it may select arbitrators; (4) that it may appoint an auditing committee; (5) that it may arrange for other railways becoming parties; (6) that it may consider appeals from the action of the Managers, and (7) that, until overruled by the Board, the decision of the Managers shall prevail. So far, there can be no pretense of restraint of trade.

Article 4 (F. 66) provides for the organization of the Board of Managers. This may be passed without comment.

Article 5. (F. 75.) This article provides (1) for organization, and (2) that the Managers shall construe the

agreement and resolutions adopted thereunder. This is merely saying that the construction adopted by the Managers shall stand and be followed consistently only with their acting within their jurisdiction in respect of the topics committed to them, and that the final rights and duties of the parties are not touched. (3) It provides that the applications for differentials and for changes of rates shall be made to the Managers. (4) It provides that their action, except as to rates and fares, shall be subject to appeal to the arbitrators. All this (except rates and fares) is mere administration, and does not touch any matter of restraint of trade. (5) It provides that their action as to rates and fares shall be subject to appeal to the Board of Control.

It will be seen that the powers of the Board of Control are not specifically defined, but they rest upon the fundamental statement, and so require the Board of Control, in adjusting rates and fares, to conform to what is "reasonable and just," as stated in the fifth paragraph of the preamble. (F. 49.)

Article 6 (F. 79), is merely administrative.

Article 7 (F. 80, 81), provides that "the duly published schedules of rates, fares and charges, and the rules applicable thereto now in force and authorized by the companies parties hereto upon the traffic covered by this agreement (and filed with the Interstate Commerce Commission as to such of said traffic as is interstate),

are hereby reaffirmed by the companies composing the association." It also provides that (F. 82, 83), "the Managers shall from time to time recommend such changes in said rates, fares, charges and rules as may be *reasonable and just* and necessary for governing the traffic covered by this agreement, and for protecting the interests of the parties hereto therein, and the failure to observe such recommendations by any party hereto as and when made, shall be deemed a violation of this agreement. No company party hereto shall, through any of its officers or agents, deviate from or change the rates, fares, charges or rules herein reaffirmed or so recommended by the Managers, except by resolution of its Board. The action of such Board shall not effect the rates, fares, charges or rules disapproved, except to the extent of its interest therein over its own road."

The third section of the article (F. 85) provides that "the powers conferred upon the Managers shall be so construed and exercised as not to permit violation of the Interstate Commerce Act, or any other law applicable to the premises, or any provision of the charters or the laws applicable to any of the companies parties hereto; and the Managers shall co-operate with the Interstate Commerce Commission to secure stability and uniformity in the rates, fares, charges, and rules established hereunder."

What can the severest, and even literal, criticism point out in these provisions that is in the slightest degree re-

straint of trade? They explicitly declare that the Managers shall recommend such changes in rates, fares, and charges as shall "be reasonable and just," and they explicitly declare that the powers of the Managers shall be so construed and exercised as not to permit any violation of the Interstate Commerce Act or any other law, and that they shall aid the Interstate Commerce Commission in every way to secure stability and uniformity in their rates, fares, and charges.

Is this agreeing to restrain trade? It is the very opposite. It is agreeing to so regulate the conduct of trade as to insure reasonableness and justice in precise conformity with law and with the public interest if, as we may assume, it is for the public interest that reasonableness, justice, and conformity to law shall prevail.

If an agreement were made between two or more carriers in the sole terms that each would carry on its operations "in true accordance with the Interstate Commerce Act in every particular," and that each should pay a heavy penalty for any breach, and that each must give thirty days' notice of non-conformity, would this be *any* restraint of trade? Surely not. And this agreement provides in detail for doing that very thing, and in some respects for doing more and better for the public by, for instance, providing for preserving to every line that share of business which both public interests and private fair-dealing should require.

If it be said that all these provisions were a disguise,

and intended to hide the real purposes of the association, the answer is that it is admitted in the Record that the purposes of the association were really what its preamble and these articles provide, and none other; and that, in the execution of the agreement, so far as it had gone down to the time of the answers being filed, there had been the same true fulfillment of the professed objects of the association.

Article 8. (F., 86, 87.) This article provides that "the Managers shall secure to each company equitable proportions of the competitive traffic covered by this agreement, so far as can be legally done." This is so obviously just that it would seem to need no explanation or comment. But it may be observed that its plain meaning is that each of the lines shall have its full share of the competitive traffic, and the public shall not be hampered or injured by any measures tending to prevent any one of the companies from doing its full duty to the public and having its fair share of business, thus keeping all the lines open and working to the fullest extent in aid of public business. An act of Congress uses the same phrase in providing for fair play in the adjustment of certain public operations. (Act of March 3, 1891.)

The second section of this article provides that the Managers (consistently with the agreement) "may determine the division of rates and fares between *connecting* companies, * * * keeping in view uniformity and

the equities involved." This provision is complained of in the ninth and eleventh assignments of errors as an agreement to divide proceeds and earnings, and as being in effect a pooling arrangement.

This contention is absolutely unfounded. It is only, as it declares in plain terms, an agreement in respect of the division of rates and fares "between *connecting* companies" (F. 89); that is, companies that form continuous lines of transportation of which each does its part, and the proportion of the whole sum earned for the common service to which each company is entitled shall be determined by the Managers. If, therefore, the provision means what it says it is obviously necessary and just, and in no sense restraint of trade or injurious to the public.

It is not needful to go through with the residue of the articles in detail. They are all (even including forfeitures and penalties, etc.) merely in support of the principal provisions which have already been stated, and which, if these principal provisions are lawful, are of no interest to the public or the court; and if these principal provisions are not lawful, it is, of course, unnecessary to discuss these following ones.

XII. But if it should be thought that these principal provisions are in "*partial* restraint of trade," it is submitted that they are such regulative provisions as are

not in "*general* restraint of trade," and do not injure the public interest, but in truth and effect promote it.

It is affirmed that the public interest in respect of carriers requires that their charges and all their conduct should be reasonable and just; and, therefore, that any agreement which does not violate this principle, but the rather supports it, is valid. The public is injured by the destruction of the business, or the bankruptcy of any line of railway or other means of communication between the various parts of the country, just as much as it is injured by excessive charges for transportation, or by agreements or contrivances by which any patron of these lines of communication is deprived of his fair equality with every other. To such ends it is lawful and right that carriers should co-operate. When in practice, either of agreement or action, they undertake to defeat these ends, they are and ought to be punished. Until they do so, they ought to be encouraged in honest and just co-operation, rather than vexed and harrassed in their efforts.

XIII. Attention is now called to the principal and clear distinctions between some of the crucial parts of the trans-Missouri contract and the agreement set forth in this Record.

1. The Missouri agreement (found in full on page 62 of the trans-Missouri Record) declares itself to be "for

the purpose of *mutual protection* by establishing and maintaining reasonable rates," etc.

The agreement here in question declares itself to be "to aid in fulfilling the purposes of the Interstate Commerce Act," and to "co-operate with each other to establish and maintain reasonable and just rates," and to "prevent unjust discrimination," and to economize. So far as purposes declared in a contract can have effect upon its meaning, the distinction between the two is broad and obvious. The first is purely and avowedly to take care of themselves, and nobody else. The second is for the purpose of doing what a strict and wholesome law required, and to co-operate in the establishment of reasonable and *just* rates, and to prevent unjust discrimination, etc. These radical differences need not be enlarged upon.

2. Article two of the Missouri contract authorizes a committee to establish rates, etc., with really no provision for anything substantial, other than against *reductions* of rates (see section 5). The agreement in this Record adopted the rates already settled by complete competition, and filed with and approved, inferentially, by the Interstate Commerce Commission; and the power to change rates was a power to change them *downward* as well as upward.

3. The trans-Missouri contract (article 2, section 8) provided for penalties against any member "who shall

reduce any rate." No such characteristic exists in the present agreement.

4. The trans-Missouri contract (article 2, section 8) forbids any agreement to be made with any shipper "to secure a reduction" of rates, etc. There is no such provision in the present agreement; but, on the contrary, the Board of Directors of each road has the express right to deviate from and change the rates recommended by the Managers, so far as the interest of its own road therein is concerned. (F. 83.) This provision gives explicit and express authority, as a part of the very agreement itself, to each one of the parties to manage its own interests in these respects absolutely. There is, therefore, reserved to each road absolute independence and liberty of action in respect of itself. It can stand alone at any moment of time. All it is required to do is to give thirty days' notice of any such action. The interstate commerce law requires notice to be given by railways of changes of rates, and it can not be illegal for carriers to agree that they will thus notify each other. It may be said that the notice required is too long. This is denied. The vast interests of commerce in the hands of producers, manufacturers, and traders require, far more than the interests of any carrier, that such changes shall not take place hastily in either direction.

5. The third section of the eighth article of the agreement in this case (which has already been cited in

another connection) positively requires the Managers to act, and limits their powers, so that nothing shall be done in violation of the Interstate Commerce Act, or any other law, etc. There is no such clause in the trans-Missouri agreement.

6. There is also in the contract in this case a distinct requirement that the Managers shall co-operate with the Interstate Commerce Commission in carrying out the law. No such provision is found in the trans-Missouri contract.

7. The trans-Missouri bill alleged as a fact that the parties to that agreement had refused to establish or give to their customers rates based on cost of construction, etc., and cost of operation, and other just elements of the problem. The answer in that case evaded this allegation by merely denying "that *by reason* of said agreement," or under duress of fine, etc., it had "refused to establish and maintain just and reasonable rates," thus plainly admitting that it had been guilty of the accusation in the bill; but that it had not refused to give reasonable rates, etc., *because* it was bound by the agreement. There is no such allegation in the bill in this case, while the answers allege continued practical reasonableness and justice, and continued competition.

XIV. The only claim made in the assignment of errors, that the agreement violates the Interstate Com-

merce Act (and the only claim possible), is that of the ninth, eleventh, and thirteenth assignments, which are all based solely on a supposed violation of section five, against pooling and division of earnings. This proposition has already been referred to and explained as applying only to the division of earnings by connecting roads forming a continuous line in reference to the provisions of section two or article nine. (F. 89.)

It may be claimed that article eight of the agreement is obnoxious to section five of the Interstate Commerce Act. This article is as follows: "The Managers are charged with the duty of securing to each party hereto equitable proportions of the competitive traffic covered by this agreement, so far as can be legally done." It does not provide for anything in respect of profits or earnings, but provides that the Managers, as far as they legally can, shall try to secure to each one of the roads its *equitable* (that is, just and right in every respect, public and private) proportions of the competitive traffic. This is not pooling, nor in the nature of pooling, but the very reverse. It requires just what the declared object of the contract was, that each company shall do its whole duty to the public, and have its just share of the business, and that the other companies shall not despoil it of its rights as it regards itself, or drive it out of its performance of the duties it owes to the public. Could anything be more just than this, if the public interest in keeping all lines alive and doing their proper service is to be subserved?

The foregoing points and suggestions are submitted with all deference, and with the greatest respect for what this court has said in another case. And it is felt to be certain that the court will gladly review the subject in the light of facts appearing in *this* Record, and in respect of which all parties to it are now before the court.

GEO. F. EDMUNDS.

No. 341. C

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